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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 497

A. J. MATTHEWS, AS TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 227–236) is reported in 113 F. 2d 452.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered July 16, 1940 (R. 236–237). The petition for writ of certiorari was filed October 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the absence of a taking the United States may abandon proceedings brought under authority of Section 4 of the Flood Control Act of May 15, 1928, to condemn flowage easements over lands in the Birds Point-New Madrid Floodway.

STATUTE INVOLVED

Section 4 of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 536, 33 U. S. C., Sec. 702d, provides:

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: * * *.
>
> The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, * * *.

STATEMENT

The judgment affirmed by the court below granted the Government's motion for voluntary nonsuit of a proceeding to condemn flowage easements over petitioner's lands located in the Birds Point-New Madrid Floodway (R. 87).[1]

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[1] Because the land involved is located in two counties, two condemnation petitions were filed, and two appeals were taken. Since the facts and issues are the same, the parties have stipulated that a petition for certiorari be filed in one case, the decision to control the other case as well (R. 237–238).

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C., Secs. 702a–m, adopted by reference the recommendations of the Chief of Engineers known as the Jadwin Plan (H. Doc. No. 90, 70th Cong., 1st Sess. (1927)). This plan recommended the creation of a floodway between Birds Point and New Madrid, Missouri, by the construction between these points of a second, or setback, levee several miles west of the existing riverside levee. The plan contemplated the reduction in height of the riverside levee from a grade of 58 to 55 feet on the Cairo gauge for a distance of about eleven miles south of Birds Point, to be known as the upper fuse plug section, and a corresponding reduction in a portion of the riverside levee for some distance at the south end of the floodway near New Madrid, to be known as the lower fuse plug section. The floodway was designed to permit the floodwaters of the Mississippi River, when the stage should exceed 55 feet on the Cairo gauge, to flow over the riverside levee just south of Birds Point, to spread out over the floodway and to flow slowly toward the south. When the flood stage of the river has sufficiently subsided, the floodwater will flow back into the river channel through the lower fuse plug section and St. Johns Bayou (R. 112–113).

The floodway, including petitioner's land, contains 130,720 acres (R. 113). Petitioner owns 20,064.69 acres (R. 112). Petitioner's land lies within the backwater area of the floodway; i. e., about

99 per cent. thereof has always been subject to overflow by backwater and surface-drainage water when the Mississippi River reached a stage of 55 feet on the Cairo gauge (R. 169).

The location of the setback levee was approved January 14, 1929, and construction was begun shortly thereafter. The floodway is now complete, except that there has not been any reduction in height of the fuse plug sections (R. 128).

On June 25, 1932, petitioner commenced an action in the Court of Claims in which he alleged that he was entitled to recover on certain contracts made in February, 1932, whereby the Government allegedly agreed to pay $394,859.51 for flowage easements over his land. The United States demurred to the petition and to an amended petition, and on April 10, 1933, on petitioner's motion, the suit was dismissed without prejudice (R. 229–230).

On the same day that he dismissed the suit on the contracts, petitioner filed another suit in the Court of Claims (R. 46–63). He did not rely upon the contracts; instead, he alleged that the passage of the Flood Control Act, the construction of the setback levee and other acts of Government officers amounted to a taking of flowage easements over his land and that, therefore, he had a claim against the United States under an "implied contract" for the value of the property so taken (R. 62). He claimed, as just compensation, $1,387,500, with interest (R. 63).

August 17, 1933, pursuant to the authorization contained in Section 4 of the Flood Control Act, *supra,* p. 2, the United States filed its petition in the District Court for the Eastern District of Missouri to condemn flowage easements over petitioner's land (R. 2–11). Petitioner answered (R. 20–45), praying that the suit be dismissed for want of jurisdiction (R. 28, 36, 45). The answer averred that, by bringing suit in the Court of Claims, petitioner had "effectively waived his right to insist on condemnation proceedings" (R. 27); that "the parties, the causes of action, scope of injury, issues, and relief sought" in the two actions were "in all respects substantially identical" (R. 36) and that the condemnation proceeding was "vexatious and oppressive" (R. 36). The District Court, however, declined to dismiss (R. 75–81). It recognized that the causes of action were the same (R. 80) but thought the condemnation proceeding should be stayed pending decision in the Court of Claims (R. 81). Accordingly, the matter of appointment of commissioners was continued from term to term and no award was ever made (R. 82–84).

On May 31, 1938, the Court of Claims found that there was no taking, concluded that petitioner was entitled to recover nothing, and dismissed the petition (R. 112–175), 87 C. Cls. 662. The court's opinion, which incorporated its findings, summarized those here material as follows (R. 169–170):

Prior to, at the time, and subsequent to the enactment of the Flood Control Act of May 15, 1928, and the construction of the set-back levee plaintiff's [petitioner's] land has been subject to complete inundation by backwaters and headwaters without any cutting down or reduction by the United States in the height of the riverside levee. As shown in the findings, all of plaintiff's land lies within the backwater area of the Birds Point-New Madrid Floodway. About 99 percent of this land has always been subject to overflow to a depth of 18 feet, and under, by backwater and surface-drainage water when the water of the Mississippi River has reached a stage of 55 feet on the Cairo gauge. * * *

The evidence of record does not establish that any additional headwater flowing over plaintiff's land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Birds Point to a grade equivalent to 55 feet on the Cairo gauge will injure, damage, or place upon plaintiff's timber or land a substantial burden or servitude to any greater extent than the timber and land have heretofore suffered, or that the creation of such spillway, through the reduction in height of a portion of the riverside levee, will actually deprive plaintiff of any valuable property rights which he heretofore enjoyed and possessed in the land and timber.

The Court of Claims concluded (R. 175):

> Upon the facts disclosed by the record and under the decisions cited, we are of opinion that there has been no taking by the United States of plaintiff's property or property rights for which recovery can be had under the Fifth Amendment. The petition is therefore dismissed.

April 6, 1939, the Secretary of War advised the Attorney General that it was unnecessary to continue the condemnation proceeding and requested that it be dismissed (R. 178–179). Pursuant to this request, the United States on April 11, 1939, applied for an order of voluntary nonsuit without prejudice (R. 84–85). Petitioner thereupon moved for the appointment of commissioners to value the property (R. 85). The findings and opinion of the Court of Claims (R. 112–175) were filed in the district court (R. 84) and October 5, 1939, order of voluntary nonsuit was entered (R. 87). The circuit court of appeals affirmed (R. 236–237).

At the same time, the circuit court of appeals denied petitioner's motion for leave to file an amended answer in that court (R. 236). The proposed amendment asserted causes of action upon the contracts alleged to have been made in February 1932, whereby the Government allegedly agreed to pay a total of $394,181.69 for easements over the lands in question; it prayed that the court specifically enforce the alleged contracts by entering decree that

the United States has flowage easements and that it pay therefor the sum of $394,181.69 (R. 183–192).

ARGUMENT

1. Petitioner acknowledges (pp. 16, 18–19) the well-established rule that, at any time before a taking, the Government may dismiss a proceeding to condemn. See e. g. *Danforth* v. *United States,* 308 U. S. 271, 284; *Lawrence Ward's Island Realty Co.* v. *United States,* 209 Fed. 201, 203 (C. C. A. 2, 1913); *Kanakanui* v. *United States,* 244 Fed. 923, 924 (C. C. A. 9, 1917); *Owen* v. *United States,* 8 F. 2d 992 (C. C. A. 5, 1925); *Johnson & Wimsatt* v. *Reichelderfer,* 66 F. 2d 217, 218 (App. D. C., 1933). He concedes also (pp. 35, 37, 41) that the findings and judgment of the Court of Claims establish that easements over his lands have not been taken. And, as the court below pointed out (R. 229, 234), he does not assert that subsequent to the action in the Court of Claims there was an appropriation of his property.[2]

However, petitioner contends (pp. 17–25) that the action could not be dismissed because Section 4 directs the Secretary of War to condemn flowage easements over lands in the Birds Point-New Madrid Floodway. But Section 4 provides that ease-

[2] Petitioner's property is in the same floodway as the land involved in *Danforth* v. *United States,* 308 U. S. 271, and this Court held that there had been no taking of the Danforth tract.

ments are to be acquired only when in the opinion of the Secretary they "are needed" in carrying out the project. The findings and judgment of the Court of Claims establish that the easements sought in the dismissed proceeding are *not* needed for maintenance of the Floodway. Therefore, the Secretary requested the Attorney General to dismiss the proceeding. The Secretary's determination is conclusive. *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 709; *Bragg* v. *Weaver,* 251 U. S. 57, 58. There is, of course, no warrant for petitioner's assertion (pp. 26–28) that the Secretary did not act in good faith.

Petitioner alleges (pp. 28–33) that he had agreements with the United States like that considered by this Court in *Danforth* v. *United States,* 308 U. S. 271. He asserts that therefore the action to condemn could not be dismissed. But in the *Danforth* case this Court stated (p. 284), "the taking in a condemnation suit *under this statute* takes place upon the payment of the money award by the condemnor. * * * Until taking, the condemnor may discontinue or abandon his effort." (Italics ours.) If, as petitioner alleges, he made contracts like that involved in the *Danforth* case, it follows that, as there said, the contracts would not prevent discontinuance of this proceeding at any time prior to the payment of award by the United States.

Moreover, as the court below held (R. 235–236):

> But in that [Danforth] case the landowner adhered to his contract rights, while in the present case Matthews not only elected the inconsistent remedy of suit on an implied contract for $1,387,500.00 rather than suing on the agreement contracts for $394,859.51, but he further specifically pleaded that he waived his right to insist upon condemnation. Matthews' agreement to set a price on his flowage easement was by the terms of the agreement valueless if he waived any right to insist upon condemnation, since the obligation of the government under the agreement was to institute condemnation proceedings and in such proceedings recommend the agreed value stated as the fair value to be rendered in judgment. The agreement was repudiated by the government, and the subsequent conduct and pleading of Matthews constituted acquiescence in the repudiation. *He has in the clearest manner elected to consider the contract abrogated and estopped himself from denying that his waiver of remedy by enforcement of the contract was final and binding.* [Italics ours.]

2. There is no substance to petitioner's contention (pp. 43–46) that the court below should have permitted him to amend his answer to set up the Government's offer to purchase the flowage rights

(see R. 224–226). As the court held (R. 236), the amendment, if made, would not affect the result.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

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